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In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME FRANKS, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether the trial court erred in denying, without an evidentiary hearing, petitioner's motion to suppress evidence seized pursuant to a search warrant issued on the basis of a facially valid, but allegedly inaccurate, affidavit.

INTEREST OF THE UNITED STATES

This case presents an important question concerning the proper scope of the Fourth Amendment ex-

clusionary rule. A substantial number of federal criminal cases involve the use of evidence seized during a search conducted on the authority of a search warrant issued upon an affidavit that, on its face, establishes probable cause. On those occasions when defendants have moved to suppress the evidence on the ground that the affidavit contained misstatements of fact, the federal courts of appeals have expressed divergent views on the availability of relief. Accordingly, the United States has a direct and significant interest in the determination whether the court below erred in concluding that a defendant may not attack the accuracy of the representations in a search warrant affidavit and, if so, what procedural and substantive requirements must be satisfied before an evidentiary hearing must be held or evidence suppressed.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the Superior Court of the State of Delaware (Kent County), petitioner was convicted of rape, kidnaping, and burglary, in violation of 11 Del. Code Ann. 764, 783, and 826 (1975 and 1976 Cum. Supp.) The Supreme Court of Delaware affirmed (A. 38–40; 373 A. 2d 578).

1. In the early morning of March 5, 1976, Cynthia Bailey was sexually assaulted in her home in Dover, Delaware (Tr. 47–55). Later the same day, petitioner was arrested by Dover police in connection with another rape charge, this one involving a 15-year old girl named Brenda Bradley. Following his arrest, petitioner remarked to Cpl. Robert McClements that he assumed the charge against him concerned Bailey rather than Bradley (Tr. 175, 186).

Four days later, after further investigation, police officers obtained a warrant authorizing a search of petitioner's apartment for "a white knit thermal undershirt; a brown 3/4 length leather jacket with a tiebelt; a pair of black men's pants; a dark colored knit hat; [and] a long thin bladed knife or other instruments or items relating to the" alleged assault upon Bailey (A. 9). In the affidavit submitted in support of the warrant (A. 6–8), Det. Ronald Brooks and Det. Larry Gray related the circumstances surrounding the Bradley rape and petitioner's statement at the time of his arrest for that crime on March 5 and averred that, on the same day, Cynthia Bailey reported that she had been raped by a black male, approximately 5 feet 7 inches in height and weighing 150 pounds, wearing a white thermal undershirt, black pants, a belt having a silver or gold buckle, a brown leather 3/4 length coat with a tie belt in the front,

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and a dark knit cap pulled around the eyes. The affiants further represented that petitioner matched Bailey's physical description of her attacker, that official records showed that petitioner had previously been convicted of assault with intent to rape, that petitioner lived only a short distance from Bailey's home, that James Williams of the Delaware Youth Center, where petitioner was employed, had revealed that petitioner's "normal dress" consisted of a white knit thermal undershirt and a brown leather jacket, and that Wesley Lucas, also of the Youth Center, had stated that petitioner often wore a dark green knit hat.

In the ensuing search of petitioner's apartment, the police seized several articles of clothing and a knife. Prior to trial, petitioner moved to suppress the evidence taken from his apartment on grounds that "[t]he search warrant used was legally insufficient in that it did not show sufficient probable cause" and that "[t]he affidavit portion of the search warrant is merely conclusory" (A. 11). At oral argument on the motion, however, petitioner expanded his contentions, alleging for the first time that the affidavit contained several false material misstatements of fact and requesting an evidentiary hearing at which the truthfulness of the police officers' representations to the magistrate could be explored. Petitioner also asserted that, if given the opportunity, he would produce Wesley Lucas of the Delaware Youth Center and James

Morrison,[1] formerly of the Youth Center, who would testify (A. 16)

> that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

No affidavits of Lucas or Morrison or any other evidentiary materials were submitted in support of petitioner's claim. The trial judge rejected petitioner's request for an evidentiary hearing, accepting the State's argument that, in ruling upon the adequacy of the showing of probable cause for a search warrant, the court could not look beyond the "four corners" of the affidavit (A. 24). It then denied the suppression motion (A. 25).

At trial, Bailey identified petitioner as her assailant and denied that she had consented to engage in sexual activities with him (A. 28–29). In addition, over petitioner's objection, the State introduced into evidence various articles of clothing (A. 29–31) and the knife (A. 31–32) that had been obtained during the search of petitioner's apartment. Petitioner took the witness stand and admitted that he had had sexual intercourse with Bailey on the morning of March 5, 1976, but

[1] The record is unclear whether the intended witness referred to by petitioner as "James Morrison" is the same person as the "James Williams" whose statements were relied upon in the search warrant affidavit.

he contended that she had voluntarily submitted to his advances (A. 37).

2. The Supreme Court of Delaware affirmed petitioner's convictions (A. 38–40), rejecting petitioner's claim that the trial judge had improperly denied his request for an evidentiary hearing to determine the truthfulness of the statements presented in the search warrant affidavit. Although the court below acknowledged that the question whether the veracity of a facially-valid search warrant affidavit could be challenged on a motion to suppress was an unsettled one, it sided with what it viewed as "the majority rule" in holding that such attacks were impermissible. The court explained (A. 40):

> First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by [petitioner] are more properly considered in a trial on the merits.

SUMMARY OF ARGUMENT

I. Although this Court "has never passed directly" (*Rugendorf* v. *United States,* 376 U.S. 528, 531–532) on the extent to which a facially valid search warrant affidavit may be attacked on the ground that it contains misstatements of fact, the federal courts of appeals have uniformly concluded that there are circum-

stances in which at least a limited inquiry into the accuracy of the representations must be allowed. We agree with these decisions that a magistrate's determination of the veracity of the factual showing for a search warrant cannot be conclusive.

The Warrant Clause of the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation * * *," and this Court has defined probable cause as "facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information * * * sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162. These important requirements would mean very little if police officers could deceive a magistrate into issuing a warrant on the strength of false representations and could thus insulate their lack of probable cause from subsequent judicial review.

None of the reasons advanced to prohibit such challenges is persuasive. A magistrate's determination of the *sufficiency* of a search warrant affidavit, while entitled to deference by trial and appellate judges, nonetheless may be attacked on a motion to suppress, and there is no reason to assume that allowance of a similar pre-trial challenge to the *truthfulness* of the affidavit would tend to deprecate the magistrate's crucial function or would have an adverse effect upon magistrates' dedication, diligence, or morale. More-

over, while such challenges might on occasion increase the duration of pre-trial proceedings, the notion that every allegation of a misrepresentation in a search warrant affidavit would lead inevitably to a protracted evidentiary hearing is illusory. Trial judges have a variety of tools to dispose summarily of insubstantial claims. Indeed, there is no proof that the numerous jurisdictions that have recognized a defendant's right to impeach a facially-sufficient search warrant affidavit have experienced a wave of lengthy suppression hearings.

II. Although a defendant may not be precluded entirely from attacking the accuracy of the representations in a search warrant affidavit, it does not follow that the right to a hearing is automatic and unlimited. As with any contention that relevant, incriminating evidence must be suppressed because of a Fourth Amendment defect in the procedures that led to its seizure, the contours of a defendant's right must be analyzed in terms of the policies underlying the exclusionary rule.

A. Despite its broad deterrent purpose, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra,* 414 U.S. 338, 348. Determination of the exclusionary rule's usefulness in the context of misstatements in a search

warrant affidavit thus requires a balancing of the incremental deterrent value of suppression against the wisdom of applying a rule that "deflects the truth-finding process and often frees the guilty." *Stone* v. *Powell,* 428 U.S. 465, 490. This in turn demands a pragmatic assessment of the culpability of the police in presenting the false statement to the magistrate and the magnitude of the harm caused by the official misconduct to the privacy rights of the subject of the search.

B. Suppression is most appropriate when law enforcement agents have engaged in intentional misconduct. In such instances the knowing and voluntary nature of their action gives rise to a strong need for deterrence and creates a realistic expectation that the suppression of evidence will have the desired effect of preventing future transgressions. So convincing is the argument in favor of suppression in cases of intentional misstatements that the exclusionary rule should be applied whenever the falsified information is likely to have influenced the magistrate's decision to issue the warrant, whether or not it was essential to the establishment of probable cause.

On the other hand, suppression of evidence attributable to wholly innocent misrepresentations, even material ones, would advance none of the interests protected by the exclusionary rule. Indeed, if the police officer had a well-founded, objective belief in the truthfulness of the facts he relayed to the magistrate, the Fourth Amendment would not have been offended even if those facts were erroneous.

The most difficult exclusionary rule problems are presented by affidavits containing factual misstatements whose falsity, while not known to the affiant, could have been ascertained through the exercise of due care. We believe that the wisest accommodation between the legitimate desire to deter unacceptable police practices and the "other values vital to a rational system of criminal justice" (*Stone* v. *Powell, supra,* 428 U.S. at 494) is achieved by concluding, as have the majority of federal courts of appeals, that an unintentional material misrepresentation voids the search warrant if made recklessly, but not if made merely negligently.

III. A defendant obviously need not be accorded an evidentiary hearing if his claim of a misstatement in a search warrant affidavit, accepted as true, would not entitle him to relief under the standards we have outlined above. Even if a suppression motion states a claim for relief, however, the trial judge should not be obliged to grant an evidentiary hearing unless the defendant (a) indicates with specificity the portions of the affidavit alleged to be false, (b) characterizes the government's responsibility for the misrepresentation, and (c) substantiates his assertions with affidavits or other sworn statements from his intended witnesses. These reasonable requirements would avoid unnecessary and time-consuming "fishing expeditions," sought either with the dim hope of eliciting statements that would contradict the affidavit or to produce useful discovery for trial, but would not unduly burden defendants who entertain a good faith belief that an affidavit is inaccurate.

IV. The courts below denied petitioner's request for an evidentiary hearing on his suppression motion in the erroneous belief that it was never permissible to conduct an inquiry into the accuracy of the representations in a search warrant affidavit. There has therefore been no consideration of the precise nature of petitioner's claims or of the adequacy of his pretrial showing of falsity. In these circumstances, it would be appropriate to remand this case with instructions to assess petitioner's motion to suppress in light of the correct substantive and procedural standards.

ARGUMENT

I. SOUND ADMINISTRATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE REQUIRES THAT A DEFENDANT BE PERMITTED TO CHALLENGE THE ACCURACY OF THE REPRESENTATIONS IN A FACIALLY VALID SEARCH WARRANT AFFIDAVIT ON A MOTION TO SUPPRESS EVIDENCE

This Court "has never passed directly" on the extent to which a facially valid search warrant may be attacked on a motion to suppress evidence on the ground that the underlying affidavit, although apparently establishing probable cause for issuance of the warrant, contained misstatements of fact. See *Rugendorf* v. *United States*, 376 U.S. 528, 531–532; *North Carolina* v. *Wrenn,* 417 U.S. 973, 973–976 (White, J., dissenting from the denial of certiorari).

In large part this is attributable to the fact that, until recently, both state [2] and federal [3] courts had been in general agreement that such attacks were impermissible.

Every federal court of appeals that has confronted the issue in the past few years, however, has held otherwise. Although articulating slightly different standards governing the kinds of allegations that must be made in a suppression motion to entitle a defendant to an evidentiary hearing or the type of showing that must be made at the hearing to entitle a defendant to relief, these courts have recognized that

[2] Indeed, this is still the rule in almost half of the states that have considered the question. See, *e.g.*, *Powell* v. *State*, 540 S.W. 2d 1 (Ark. Sup. Ct.); *State* v. *Williams*, 169 Conn. 322, 363 A. 2d 72; *People* v. *Stansberry*, 47 Ill. 2d 541, 268 N.E. 2d 431, certiorari denied, 404 U.S. 873; *State* v. *Sanders*, 222 Kan. 189, 563 P. 2d 461, certiorari denied, October 3, 1977, No. 76–1793; *Caslin* v. *Commonwealth*, 491 S.W. 2d 832 (Ky. Ct. App.); *Wood* v. *State*, 322 So. 2d 462 (Miss. Sup. Ct.); *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111, certiorari denied, 386 U.S. 1024; *State* v. *Brugioni*, 320 Mo. 202, 7 S.W. 2d 262; *State* v. *Petillo*, 61 N.J. 165, 293 A. 2d 649, certiorari denied, 410 U.S. 945; *Brown* v. *State*, 565 P. 2d 697 (Okla. Crim. App.); *State* v. *Seymour*, 46 R.I. 257, 126 Atl. 755, partially overruled on other grounds, *State* v. *LeBlanc*, 100 R.I. 523, 217 A. 2d 471; *Owens* v. *State*, 217 Tenn. 544, 399 S.W. 2d 507; *Oubre* v. *State*, 542 S.W. 2d 875 (Tex. Crim. App.). See generally Comment, *Challenges to the Veracity of Facially Sufficient Warrants—Is the Truth Irrelevant?*, 7 Seton Hall L. Rev. 827, 843–844 (1976) (collecting cases).

[3] See, *e.g.*, *Kenney* v. *United States*, 157 F. 2d 442 (C.A. D.C.); *Gracie* v. *United States*, 15 F. 2d 644 (C.A. 1), certiorari denied, 273 U.S. 748; *United States* v. *Brunett*, 53 F. 2d 219 (W.D. Mo.). See also *United States* v. *Bowling*, 351 F. 2d 236, 242 n. 2 (C.A. 6), certiorari denied, 383 U.S. 908.

at least a limited examination of the accuracy of the representations in a search warrant affidavit is appropriate. See, *e.g.*, *United States* v. *Belculfine*, 508 F. 2d 58 (C.A. 1); *United States* v. *Pond*, 523 F. 2d 210 (C.A. 2), certiorari denied, 423 U.S. 1058; *United States* v. *Armocida*, 515 F. 2d 29 (C.A. 3), certiorari denied *sub nom. Gonzal* v. *United States*, 423 U.S. 858; *United States* v. *Lee*, 540 F. 2d 1205 (C.A. 4), certiorari denied, 429 U.S. 894; *United States* v. *Thomas*, 489 F. 2d 664 (C.A. 5), certiorari denied, 423 U.S. 844; *United States* v. *Luna*, 525 F. 2d 4 (C.A. 6), certiorari denied, 424 U.S. 965; *United States* v. *Carmichael*, 489 F. 2d 983 (C.A. 7) (*en banc*); *United States* v. *Marihart*, 492 F. 2d 897 (C.A. 8), certiorari denied, 419 U.S. 827; *United States* v. *Taxe*, 540 F. 2d 961 (C.A. 9), certiorari denied, 429 U.S. 1040; *United States* v. *Harwood*, 470 F. 2d 322 (C.A. 10).[4]

We agree with these decisions that the proper administration of the exclusionary rule demands some inquiry into the truth of the factual basis for a search warrant affidavit. The Warrant Clause of the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation * * *," and this Court has defined probable

[4] See also American Law Institute, *A Model Code of Pre-Arraignment Procedure* § SS290.3(1)(a) (1975): "[I]n any proceeding on a motion to suppress evidence seized by authority of a search warrant, or incidental to an arrest made by authority of an arrest warrant, the moving party shall be entitled to contest, by cross-examination or offering evidence, the good faith of any testimony presented to the issuing authority and relied on to establish reasonable cause for issuance of the warrant."

cause as "facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information * * * sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed or that evidence of a crime will be found in the area to be searched. *Carroll* v. *United States,* 267 U.S. 132, 162. These important requirements, which are designed to "prevent[] the issue of warrants on loose, vague or doubtful bases of fact" (*Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 357), would be "reduce[d] * * * to a form of words" (*Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392) if police officers could deceive a magistrate into issuing a search warrant on the strength of false representations and could thus insulate their lack of probable cause from subsequent judicial review. To ensure compliance with constitutional standards, an officer who makes a warrantless search (*e.g.,* because of exigent circumstances) is routinely obliged to defend the accuracy as well as the sufficiency of his assessment of probable cause at an adversary suppression hearing. *Terry* v. *Ohio,* 392 U.S. 1, 21–22. There is little reason to relieve the officer of a substantial part of this obligation by foregoing entirely any post-search scrutiny of the truthfulness of his factual assertions simply because the probable cause determination may have been submitted *ex parte* to a judicial officer in advance. On the contrary, it would appear that the deterrent objectives of the exclu-

sionary rule would be well served by allowing such challenges in appropriate circumstances.[5]

Moreover, none of the rationales that have been advanced in decisions prohibiting challenges to the accuracy of a search warrant affidavit is persuasive.

1. The argument most frequently presented is that the privacy interests protected by the Fourth Amendment are substantially satisfied by requiring the magistrate to consider the affiant's credibility carefully before issuing the search warrant[6] and would not be aided significantly by a second inquiry into the subject after the search has occurred. See, *e.g., State* v.

[5] Although not relevant to a defendant's entitlement to an evidentiary hearing on his suppression motion, the fact that a warrant was obtained by the police officer may be extremely significant in the ultimate determination whether the evidence uncovered as a result of the search should be suppressed. In the government's petition for a writ of certiorari in *United States* v. *Karathanos*, No. 75–1402, certiorari denied, 428 U.S. 910, we argued that a distinction should be drawn for exclusionary rule purposes between searches with and without warrants and that the rule should not be applied to bar the admission of evidence, obtained in good faith by federal law enforcement officers executing a facially valid search warrant issued by a federal magistrate, because the warrant was ultimately held to have been erroneously issued. The petition recognized an exception, however, for warrants "procured in bad faith or on the basis of material misrepresentations" (Pet. 11–12).

[6] Magistrates are equipped with authority to accomplish this task. Rule 41(c), Fed. R. Crim. P., for example, provides that "[b]efore ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce * * *." See also 11 Del. Code Ann. 2301 *et seq.* (1975).

Anselmo, 260 La. 306, 256 So. 2d 98, 101, certiorari denied, 407 U.S. 911; *People* v. *Bak,* 45 Ill. 2d 140, 144–146, 258 N.E. 2d 341, 343–344, certiorari denied, 400 U.S. 882. As Chief Justice Weintraub put the matter in *State* v. *Burnett,* 42 N.J. 377, 388, 201 A. 2d 39, 45, in a passage quoted with approval in *McCray* v. *Illinois,* 386 U.S. 300, 307, "[w]here the issue of probable cause is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding." Once that process has occurred, these courts have reasoned, re-examination of the credibility question on a motion to suppress would tend to deprecate the importance of the magistrate's crucial function and "would make the issuance of a warrant more mechanical and less a solemn judicial act * * *." Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppres ng Evidence,* 84 Harv. L. Rev. 825, 830 (1971).[7]

2. Other courts have contended, with some justification, that a rule sanctioning challenges to a search warrant based upon the falsity of the underlying affidavit would necessarily precipitate a number of time

[7] As Judge Frankel observed in *United States* v. *Halsey,* 257 F. Supp. 1002, 1005 (S.D. N.Y.): "To begin at the beginning, when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing. And so, if there were nothing more to consider, it would follow that the veracity of a supporting affidavit could always be tried on a motion to suppress. But there are other, ultimately decisive things to consider. One is the question of appropriately dividing power and responsibility between the magistrate issuing a warrant and a judge later considering its legality."

consuming "mini-trials," often requiring the resolution of difficult questions concerning a witness's veracity. In light of what these courts have considered to be "the speculative risk of a rare warrant issued on a false statement" (*State* v. *Petillo,* 61 N.J. 165, 178, 293 A. 2d 649, 655, certiorari denied, 410 U.S. 945), and the availability of an "indictment for perjury or false swearing, a charge of criminal contempt, and assessment of monetary damages in a civil action" against the occasional mendacious affiant (*id.* at 174, 293 A. 2d at 653–654), such mini-trials have not been thought to be worth the cost of taxing further an already overburdened judicial system and of "frustrat[ing] the public's interest in the fast and expeditious administration of criminal laws." *United States* v. *Dionisio,* 410 U.S. 1, 17. See, *e.g., State* v. *Anonymous,* 30 Conn. Supp. 211, 309 A. 2d 135, 143; *Brown* v. *State,* 565 P. 2d 697, 701 (Okla. Crim. App.); *State* v. *Anselmo, supra,* 256 So. 2d at 103–104.

3. Finally, other courts, among them the court below (A. 40), have observed that any claim of falsity in a search warrant affidavit, when raised in a pretrial suppression motion, is inherently suspect in view of the probative evidence of criminal activity uncovered by the search, but that, to the extent that the question of the affidavit's truthfulness is subject to relitigation, it involves essentially an issue of credibility of the government's proof that should best be left for trial. See, *e.g., State* v. *Williams,* 169 Conn. 322, 363 A. 2d 72, 76–77; *State* v. *Petillo, supra,* 61 N.J. at 177, 293 A. 2d at 655.

There are, we believe, satisfactory answers to each of these concerns. It does not disparage the important role played by the magistrate to suggest that his conclusions about an affiant's veracity should be reviewable. A magistrate's probable cause determination, after all, while entitled to some deference at a suppression hearing (*United States* v. *Ventresca,* 380 U.S. 102, 106, 109; *Aguilar* v. *Texas,* 378 U.S. 108, 111), has always been subject to later examination by trial and appellate judges, apparently without appreciable adverse effects upon magistrates' dedication, diligence, or morale. Indeed, there would appear to be even greater justification for permitting post-search challenges to an affidavit's accuracy than to its sufficiency: unlike the legal question of probable cause (which depends for its resolution solely upon a reading and evaluation of the face of the affidavit), an adequate inquiry into the truthfulness of the affiant's factual allegations often may not be feasible in a non-adversary proceeding or in the hurried atmosphere in which many warrants are issued. Moreover, even if such an inquiry could be made, a rule preventing any examination into the accuracy of the representations in an affidavit after a warrant has been issued would discourage magistrates from relying upon an affiant's facially credible factual assertions, surely an unwise development.

Nor can an absolute prohibition on such challenges be justified by considerations of administrative convenience. If, as we believe, challenges to the veracity of a search warrant affidavit are necessary to ensure

the realization of the deterrent purposes of the exclusionary rule, the desire to expedite pre-trial procedures, albeit legitimate, would not justify total preclusion of a forum in which to air these claims. But more important, the premise for this argument is faulty:

> First, 60 to 90 per cent of all defendants plead guilty, usually without a prior motion to suppress. Second, most searches are conducted without warrants, and the defendants in these cases now have full opportunity to file a suppression motion. Third, even in those few cases involving warrants, defendants can obtain a suppression hearing of limited scope, simply by asserting that the warrant's execution was unlawful. Hence, permitting defendants to controvert warrants would increase the present number of suppression hearings only insignificantly and merely add length to some hearings already granted.

Grano, A *Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury,* 1971 U. of Ill. L. F. 405, 417 (footnotes omitted). Moreover, it is by no means necessary that every allegation of a misrepresentation in a search warrant affidavit be permitted to spawn a protracted evidentiary hearing. As we discuss below (see pp. 30–33, *infra*), trial judges have a variety of tools to dispose of frivolous or insubstantial claims without a full-dress hearing. We know of no evidence indicating that those state and federal jurisdictions that have allowed defendants to attack the accuracy of search

warrant affidavits on a motion to suppress have experienced a deluge of time-consuming proceedings.[8]

Finally, it is no answer to the problem of inaccurate search warrant affidavits to suggest that the credibility question be left for trial. The affiant may not testify, and even if he does, the representations he made in order to obtain the warrant may be wholly irrelevant to the issue of guilt or innocence, in which event cross-examination on that subject would properly be foreclosed. What is more, once the court has determined to admit the evidence seized pursuant to the challenged warrant, the remedy to a defendant

[8] By the same token, there is little reason to believe that these administrative costs, even if slight, are unnecessary because the alternative sanction of civil or criminal proceedings against a police officer who has submitted a false affidavit would be a sufficient deterrent. See generally Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839 (1974). Even if available, and they may not be (*e.g.*, the false statement may not have been intentional), such alternative remedies have not been thought adequate to deter Fourth Amendment violations in other contexts. Although the exclusionary rule has been criticized as "a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large" (*United States* v. *Dunnings*, 425 F. 2d 836, 840 (C.A. 2) (Friendly, J.), certiorari denied, 397 U.S. 1002), and its utility has been severely questioned (see, *e.g.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 411–424 (Burger, C. J., dissenting)), it is the currently accepted response once evidence has been seized in violation of a defendant's Fourth Amendment rights. *Mapp* v. *Ohio*, 367 U.S. 643. Although we discuss below what we believe to be the proper limitations of the exclusionary rule in the context of false search warrant affidavits (see pp. 21–30, *infra*), we see no justification, so long as the exclusionary rule exists, for a blanket refusal to apply the remedy of suppression for such violations.

who has exposed the inaccuracy at trial will rarely be adequate.[9]

II. THE LEGAL SIGNIFICANCE OF A FALSE STATEMENT IN A SEARCH WARRANT AFFIDAVIT SHOULD BE ANALYZED IN LIGHT OF THE PURPOSES OF THE EXCLUSIONARY RULE

The conclusion that a defendant may not be totally precluded from attacking the accuracy of a search warrant affidavit does not suggest that every suppression motion charging a mistake or misrepresentation in the affidavit must result in an evidentiary hearing or that every showing that an affidavit contained a false statement must inevitably lead to the suppression of evidence. The right to challenge the veracity of the representations in a facially valid search warrant affidavit, we submit, is not automatic and unlimited.

This case may not be an appropriate vehicle in which to explore fully the limits of the right, because the courts below denied petitioner an evidentiary hearing, without any consideration of the nature of his claims, in the belief that "no attack upon the veracity of an underlying affidavit may be made" (A. 40). Nonetheless, it may prove helpful in the disposition of this case to provide a brief outline of the approach that we believe should be utilized to resolve this type of recurring problem.

[9] The related suggestion that the discovery of probative evidence in the course of execution of the warrant tends to substantiate the accuracy of the representations in the affidavit is incompatible with the settled doctrine that the legality of a search may not be sustained by what it in fact discloses. See *United States* v. *DiRe*, 332 U.S. 581, 595.

In our view, the contours of a defendant's right to obtain suppression of relevant, incriminating evidence seized pursuant to a facially sufficient search warrant because of a defect in the procedures that led to its issuance must be analyzed in terms of the policies underlying the Fourth Amendment exclusionary rule. A court should delve behind the face of a search warrant affidavit only in those instances where an alleged error in the affidavit has resulted "from an act or omission by a government agent which is objectionable in light of the purposes of the fourth amendment." Kipperman, *supra,* 84 Harv. L. Rev. at 831.

A. The judicially created exclusionary rule is designed to compel "respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217.[10] As the Court explained in

[10] The exclusionary rule has also been justified on principles of "judicial integrity" that make courts unwilling to become a "party to lawless invasions of the constitutional rights of citizens." *Terry* v. *Ohio*, *supra*, 392 U.S. at 12–13. See also *Elkins* v. *United States*, *supra*, 364 U.S. at 222. But those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 458–459 n. 35. That is, principles of judicial integrity preclude the courts from admitting evidence where to do so would significantly encourage future invasions of constitutional rights. *Ibid.* The rationale of judicial integrity therefore does not constitute "an independent basis for excluding challenged evidence." *Michigan* v. *Tucker*, 417 U.S. 433, 450 n. 25. See also *Stone* v. *Powell*, 428 U.S. 465, 485; *United States* v. *Peltier*, 422 U.S. 531, 536–539; *United States* v. *Calandra*, 414 U.S. 338, 355–356 n. 11.

Michigan v. *Tucker,* 417 U.S. 433, 447:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

Despite its broad deterrent purpose, however, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra,* 414 U.S. 338, 348. Recognizing that the suppression remedy is not "a personal constitutional right of the party aggrieved" (*id.* at 348) and that "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell,* 428 U.S. 465, 491), this Court on a number of occasions has declined to extend the exclusionary rule to situations in which the effectiveness of the sanction in deterring improper official conduct was outweighed by the significant social costs that the rule exacts—the suppression of relevant evidence of criminal activity. See, *e.g., Stone* v. *Powell, supra,* 428 U.S. at 489; *United States* v. *Janis,* 428 U.S. 433, 454; *United States* v. *Peltier,* 422

U.S. 531, 539; *United States* v. *Calandra, supra,* 414 U.S. at 351–352; *Alderman* v. *United States,* 394 U.S. 165, 171–172.

Determination of the exclusionary rule's usefulness in the context of misrepresentations in search warrant affidavits thus requires a balancing of the incremental deterrent value of suppression against the wisdom of applying a rule that "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell, supra,* 428 U.S. at 490.[11] This in turn demands a pragmatic assessment of the culpability of the police in presenting the false statement to the magistrate and the magnitude of the harm caused by the misconduct to the privacy rights of the defendant, *i.e.,* the materiality of the misrepresentation to the issuance of the warrant.[12]

[11] There must, of course, be a threshold finding that the Fourth Amendment has been violated before the appropriateness of applying the exclusionary rule may be considered. For example, erroneous statements in a search warrant affidavit as to matters not within the affiant's personal knowledge—such as allegations of criminality, related by a previously reliable informant, that turn out to be untrue—would not vitiate probable cause if the affiant had a substantial, reasonable basis for crediting the erroneous representations. See *United States* v. *Harris,* 403 U.S. 573; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. This Court recognized as much in *Rugendorf* v. *United States, supra,* 376 U.S. at 533 (footnote omitted): "Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant."

[12] Materiality here means only that the erroneous allegation was necessary to establish probable cause. See *Kipperman, supra,* 84 Harv. L. Rev. at 829 n. 35. To determine materiality, the court "excis[es] the misrepresentative parts from the affidavit and then examin[es] the residue for probable cause." *United States* v. *Thomas, supra,* 489 F. 2d at 668. Misstatements not essential to the probable cause showing subject those against whom the search was directed to no greater intrusion than the government was entitle to undertake, since the warrant presumably would have issued in the absence of any misrepresentation. It is for this reason that the exclusionary rule has not been held to require the suppression of evidence seized pursuant to a search warrant issued on the basis of an affidavit including tainted representations that were not necessary to the establishment of probable cause. See *United States* v. *Marchand,* C.A. 2, No. 77–1131, decided August 22, 1977, slip op. 5410–5411 (Friendly, J.) (collecting cases), pending on petition for a writ of certiorari, No. 77–775; *United States* v. *Grunsfeld,* 558 F. 2d 1231, 1239–1241 (C.A. 6), pending on petition for a writ of certiorari, No. 77–5271.

B. Application of the exclusionary rule obviously is most appropriate when law enforcement officers have engaged in intentional misconduct. In such cases the knowing and voluntary nature of the misrepresentation gives rise to a strong need for deterrence and at the same time promises that the suppression of evidence will tend to have the desired effect of preventing future transgressions. Suppression is also justified to further the "imperative of judicial integrity," since the misconduct involved is the deliberate deception of a judicial officer and the consequent subversion of the judicial process. See *Stone* v. *Powell, supra,* 428 U.S. at 484.

Indeed, so convincing is the argument in favor of suppression in cases of intentional misstatements in a search warrant affidavit (and so implausible the countervailing interests justifying such behavior) that

the exclusionary rule should be applied even if the falsified information is not necessarily material to the probable cause determination. Unless this sanction were available, there would be little to discourage unscrupulous police officers from appending untrue allegations to an affidavit in any close case in an effort to sway a hesitant magistrate. We agree with the First Circuit's observation in *United States* v. *Belculfine, supra,* 508 F. 2d at 63, that "[w]ere the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy." To eliminate any incentive of the police to capitalize upon such tactics, evidence should be excluded if obtained as a result of a search warrant procured by use of an affidavit containing any "intentional, relevant, and nontrivial misstatement" (*ibid.*).[13]

[13] An alternative standard, articulated by some courts, bars evidence whose seizure is attributable to any misrepresentation "committed with an intent to deceive the magistrate." See, *e.g.*, *United States* v. *Thomas*, *supra*, 489 F. 2d at 669. A broader rule, requiring suppression in *every* instance of an intentional misrepresentation, would be unnecessarily costly, since law enforcement officers may occasionally include false statements in a search warrant affidavit in good faith and with no desire to subvert the Fourth Amendment (*e.g.*, a pseudonym may be used to protect the identity of a confidential informant). While such misrepresentations are not encouraged, they do not involve the same degree of culpability as do misrepresentations calculated either to obtain a warrant that should not be issued or to remove doubts about the existence of probable cause.

On the other hand, suppression of evidence attributable to wholly innocent misstatements, even material ones, would advance none of the interests protected by the exclusionary rule. See, *e.g.*, *United States* v. *Hole,* 564 F. 2d 298, 301 (C.A. 9); *United States* v. *Evers,* 552 F. 2d 1119, 1122 (C.A. 5); *United States* v. *Taxe, supra,* 540 F. 2d at 967. The law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan* v. *Tucker, supra,* 417 U.S. at 446. Where the erroneous official action was pursued in good faith, therefore, the deterrence rationale loses much of its force. *Id.* at 447.

More important, if the police officer had a well founded, objective belief in the accuracy of the facts he relayed to the magistrate, even if those facts were erroneous the Fourth Amendment itself would not have been offended. "It is true that the warrant will have been issued on inaccurate data, but the fourth amendment has been read not to proscribe 'inaccurate' searches, but rather only 'unreasonable' ones. And a warrant based on information which the affiant and the magistrate both had reasonable grounds for believing is a reasonable one." Kipperman, *supra,* 84 Harv. L. Rev. at 832 (footnote omitted). See *Brinegar* v. *United States,* 338 U.S. 160, 176; note 11, *supra.*

In between the polar extremes of intentional and innocent misrepresentations lie factual misstatements whose falsity, while not known to the affiant, could have been ascertained by the exercise of due care. Although the federal courts of appeals are in agreement that such misrepresentations should not lead to suppression if unnecessary to the establishment of probable cause, slightly different positions have emerged in the treatment of material misrepresentations. The majority of circuits have held that an unintentional material misrepresentation voids the warrant if made recklessly, but not if made merely negligently. See, *e.g., United States* v. *Collins,* 549 F. 2d 557, 561 (C.A. 8); *United States* v. *Lee, supra,* 540 F. 2d at 1209; *United States* v. *Rosenbarger,* 536 F. 2d 715, 720 (C.A. 6), certiorari denied, 431 U.S. 965; *United States* v. *Marihart, supra,* 492 F. 2d at 899–900; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. Other circuits have suggested, however, that the deterrent purposes of the exclusionary rule would be better served by holding the warrant invalid even if the affidavit contained only a negligent misrepresentation of a material fact. *United States* v. *Astroff,* 556 F. 2d 1369, 1371–1372 (C.A. 5), rehearing *en banc* granted, 564 F. 2d 199. See also *United States* v. *Gonzalez,* 488 F. 2d 833, 837 (C.A. 2); *United States* v. *Harwood, supra,* 470 F. 2d at 324–325.

There is much to be said in favor of a rule requiring the suppression of evidence seized as a result of material misstatements that are included in an affidavit without regard for their accuracy. Reckless misstatements submitted to a magistrate in an effort to procure a search warrant are deserving of condemnation, are deterrable, and (when material) have directly contributed to a significant, unjustified governmental intrusion. Enforcement of the exclusionary rule in these circumstances would encourage law enforcement officers to make some effort to verify key facts before seeking a warrant and would add substantially to the privacy interests protected by the Fourth Amendment.

These arguments lose much of their force, however, when a misstatement is the product of simple negligence. While negligent conduct by police officers is avoidable in theory, in practice "no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further." *United States* v. *Carmichael, supra,* 489 F. 2d at 989. It would, in addition, be especially unfortunate if suppression of probative evidence of guilt were to depend upon the outcome of elaborate evidentiary hearings at which both sides would attempt—seldom, we suspect, with satisfactory results—to establish the degree of care that a hypothetical "reasonable policeman" would have exercised under the circumstances of a particular case or upon a judicial determination of a concept as subjective and slippery as "negligence."

Moreover, even assuming that exclusion of evidence in the case of a negligent misrepresentation might have some "incremental deterrent effect" (*United*

States v. *Calandra, supra,* 414 U.S. at 351), any marginal benefits would be "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone* v. *Powell, supra,* 428 U.S. at 494. All too often the rule would result in suppression where "[t]he disparity * * * between the error committed by the police officer and the windfall afforded a guilty defendant * * * is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 490 (footnote omitted). Under no view of the realistic "balancing process" (*id.* at 488) required by the exclusionary rule do we think it appropriate to insist upon the suppression of evidence in such circumstances.

III. AN EVIDENTIARY HEARING ON A DEFENDANT'S CLAIM OF MISREPRESENTATION IN A SEARCH WARRANT AFFIDAVIT NEED NOT BE HELD IN THE ABSENCE OF SPECIFIC FACTUAL ALLEGATIONS WHICH SATISFY THE TRIAL JUDGE THAT A FURTHER INQUIRY IS REQUIRED

Although a defendant should be allowed to challenge the accuracy of the representations in a facially-valid search warrant affidavit, such claims may of course be dismissed without an evidentiary hearing if, accepted as true, they would not entitle the defendant to relief. Thus, under the principles outlined above, summary disposition of a motion to suppress would be appropriate if a defendant's claims amounted to nothing more than an allegation of an unintentional immaterial misrepresentation or of an innocent or negligent misrepresentation, whether or not material.

Even if a defendant's allegations state a claim for relief, however, the trial judge should not be required to grant a hearing if the suppression motion is supported solely by vague or conclusory assertions. It would be the rare defendant who could not invent a plausible claim of falsity in the search warrant affidavit (combined with an automatic allegation that the misstatement was intentional) in the hope that, by cross-examination of the affiant and the sources of the affiant's information, he might elicit statements that would either contradict the affidavit or provide useful discovery for trial.

Such "fishing expeditions" should be prohibited not only because they would embroil the courts in time-consuming and unnecessary pre-trial proceedings, but also because a search warrant affidavit is more than a mere pleading, the contents of which may be placed in issue by a simple denial. It is a sworn statement, generally by a law enforcement agent, that has been accepted as true and acted upon by a judicial officer. As such, as the federal courts have uniformly held, it is presumptively valid and may be called into question only by a preliminary showing of falsity. See *United States* v. *Scott,* 555 F. 2d 522, 528 (C.A. 5) (collecting cases), certiorari denied, No. 77–432, December 5, 1977.[14]

[14] This notion obviously is not limited to attacks upon search warrant affidavits. A defendant's entitlement to an evidentiary hearing on a motion for a new trial (see, *e.g.*, *United States* v. *Curry,* 497 F. 2d 99, 101 (C.A. 5), certiorari denied, 419 U.S. 1035; *United States* v. *Houle,* 490 F. 2d 167, 171 (C.A. 2), certiorari denied, 417 U.S. 970) or collateral relief (see *Blackledge* v. *Allison,* 431 U.S. 63, 75–76) is also dependent upon his making an initial demonstration that there is substance to his claim.

Because affidavits for search warrants will vary widely in their content, it is impossible to anticipate the different types of showings that would satisfy this standard. "[A]s it does so very often in procedural and evidentiary matters," the final decision must rest "within the good sense and experience of the district judge * * *." *Palermo* v. *United States,* 360 U.S. 343, 353. At a minimum, however, we believe that the burden must include the following: First, the defendant should be required to specify the precise information in the search warrant affidavit that he contends is false and to state whether the misrepresentation resulted from the intentional or reckless conduct of the government. Each of these contentions should be accompanied by a detailed statement of the reasons that support it. See *United States* v. *Scott, supra,* 555 F. 2d at 528.[15] Second, the defendant should be obliged to furnish affidavits or other sworn statements (*e.g.,* a transcript of testimony at another proceeding) of the major witnesses upon whom he will rely to prove his claim. See *United States* v. *Luna, supra,* 525 F. 2d at 6; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. In cases where satisfaction of the affidavit requirement would be impractical (*e.g.,* where the defendant intends to call a hostile witness, such as a police officer), the defendant should inform the court of these difficulties and should submit an affidavit

[15] Cf. American Law Institute, *A Model Code of Pre-Arraignment Procedure, supra,* § SS290.3(1)(b) (evidence upon which a search warrant is issued may be contested "only upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony * * *").

setting forth the testimony that he expects to present at an evidentiary hearing to establish the falsity of the representations made to procure the search warrant.

Compliance with these procedures would not be unduly burdensome to defendants who entertain a good faith belief that a search warrant affidavit is inaccurate. Moreover, these requirements are not inflexible, and trial judges would have a wide measure of discretion to dispense with them in an appropriate case. But a defendant should have no constitutional right to an evidentiary hearing unless these reasonable prerequisites, which accommodate the interests of the Fourth Amendment with legitimate concerns for judicial economy, have been satisfied.

IV. THIS CASE SHOULD BE REMANDED FOR A DETERMINATION WHETHER PETITIONER'S BELATED, UNSWORN ALLEGATIONS WERE SUFFICIENT TO ENTITLE HIM TO AN EVIDENTIARY HEARING

At the oral argument on his suppression motion, petitioner challenged for the first time those portions of the search warrant affidavit of Detectives Brooks and Gray that represented that James Williams and Wesley Lucas of the Delaware Youth Center, where petitioner was employed, had told them that petitioner often dressed in clothing similar to that worn by Bailey's assailant. Petitioner asserted that Lucas and Morrison would testify at an evidentiary hearing that some of the statements attributed to them in the affidavit had never been made to the affiants and that the affiants had not accurately related others to

the magistrate (A. 16). Although it is arguable that the allegedly false statements were not essential to the establishment of probable cause,[16] the nature of the allegations of falsity suggests the possibility that the misstatements, if any, were made with an intent to deceive the magistrate into issuing the warrant.[17] If that suspicion were substantiated, the materiality of the false statements would be irrelevant under the standards we have proposed.

On the other hand, although petitioner's allegations of falsity were specific, they were neither made in his written motion to suppress nor supported by affi-

[16] As noted above (see p. 3, *supra*), the affidavit truthfully represented that petitioner had virtually admitted to the police that he had been involved in sexual activity with Bailey. Although at the suppression hearing petitioner objected to the use of this statement on the ground that it had been unlawfully obtained (A. 15), this contention was rejected by the trial judge and the Supreme Court of Delaware and petitioner did not preserve the issue in his petition for a writ of certiorari.

[17] Petitioner's counsel explained at the suppression hearing (A. 22-23): "The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said that did not personally contact those individuals at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from what I have been told that in fact they didn't even contact that person. They may have had some other information a little bit different, but obtained through another police officer

davits or other evidentiary materials from persons with first-hand knowledge of the crucial events, even though there would appear to be no reason why such proof could not have been obtained. At thi juncture, however, there is no necessity for this Court to consider the adequacy of petitioner's pre-trial showing of falsity, because the trial judge based his denial of petitioner's request for an evidentiary hearing, not upon any defects in petitioner's proffer, but rather upon the erroneous legal conclusion that such a hearing was never required (A. 28). In these circumstances, we submit that the appropriate disposition is to remand this case with instructions to consider petitioner's request for an evidentiary hearing on his motion to suppress under the substantive and procedural principles discussed above.[18]

and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

"I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was."

[18] A state is of course free as a matter of local practice to impose less restrictive guidelines than the ones we have suggested for determining whether a defendant's preliminary showing is sufficient to entitle him to an evidentiary hearing.

CONCLUSION

The judgment of the Supreme Court of Delaware should be vacated and the case remanded for further proceedings consistent with the views we have expressed.

Respectfully submitted.

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